



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 20, 1996

Mr. Randall C. Stump  
Stump, Stump & Stump  
P.O. Box 286  
Georgetown, Texas 78627

OR96-2458

Dear Mr. Stump:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102501.

The City of Bartlett (the "city") received a request for copies of "any information, reflecting the nature of the pending litigation . . . discussed in the closed session of the Bartlett City Council meeting of Sept. 16, 1996." You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107(1), and 552.117 of the Government Code, and as attorney work product. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

To the extent that the request seeks the tape recording and a certified agenda of this closed executive session, that information must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code makes this information confidential. Gov't Code § 551.104(c).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that

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<sup>1</sup>We note that another law firm representing the city in this matter claimed additional exceptions to disclosure after the expiration of the 10-day deadline imposed by section 552.301 of the Government Code. As these additional exceptions were not timely raised, we consider only those mandatory exceptions to disclosure that protect a third-party's privacy or proprietary interests. The remainder of the exceptions claimed by the city after the 10-day deadline are waived. See Open Records Decision No. 195 (1978).

(1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the documents responsive to the request are "primarily what is in the files of the City or other legal counsel for the City, with the exception of a couple of letters and the agenda." This office recently issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.103 or section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5 citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and that, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

We must first determine whether the records were created for trial or in anticipation of litigation. Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). We conclude that, for the first two matters discussed in the executive session, the city has established that litigation is reasonably anticipated.<sup>2</sup> See Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). Therefore, to the extent that the request encompasses the attorney's entire litigation file in connection with these two matters, the city may withhold the attorney's entire litigation file in these two matters under the work product doctrine as incorporated by section 552.103(a) of the Government Code.

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<sup>2</sup>We note that the city provided us with a copy of a petition that was filed against the city and others after the city received this request for information in one of these two matters.

To the extent that the documents submitted to this office for review pertaining to the first two matters discussed in executive session do not comprise the attorney's litigation file, we conclude that they are related to reasonably anticipated litigation and, therefore, may be withheld under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). This would include agendas of public meetings, correspondence with opposing counsel and pleadings that have been filed with the court.<sup>3</sup> In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now turn to the third matter discussed during the closed executive session. The city claims that any documents regarding an issue discussed in executive session are excepted from disclosure under sections 525.101 and 552.107(1) of the Government Code. However, this office has previously concluded that the Open Meetings Act cannot be read together with the Open Records Act so as to automatically withhold any document which is discussed in executive session. Open Records Decision No. 485 (1987). We now address the individual claimed exceptions to disclosure.

Section 552.103(a) is applicable only where litigation involves or is expected to involve the governmental body claiming the exception. Open Records Decision No. 132 (1976). Here, although you state that the city could become a party, you have not offered any concrete step toward litigation against the city. Therefore, the city may not withhold the information relating to the third matter under section 552.103(a).

Although the city also claims that section 552.108 and the informer's privilege protect the information related to the third matter discussed in executive session, these exceptions were not claimed within the ten days required by section 552.301 of the Government Code. Therefore, the city may not withhold this information under either of these exceptions. We have reviewed the information regarding the third matter discussed and conclude that it is not excepted from disclosure under sections 552.101, 552.102, or 552.107(1).

Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section

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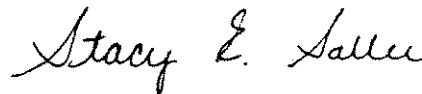
<sup>3</sup>Further, none of the other timely claimed exceptions to disclosure would apply to these documents.

552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

The protection afforded under section 552.117 is automatic for "peace officers" as that term is defined in article 2.12 of the Code of Criminal Procedure. You must, therefore, withhold information relating to the home address, home telephone number, and social security number of a peace officer, as well as information revealing whether that peace officer has family members.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 102501

Enclosures: Submitted documents

cc: Ms. Lana Hill  
Box 95  
Bartlett, Texas 76511  
(w/o enclosures)

Mr. Kenton D. Johnson  
Hall & Johnson, P.L.L.C.  
602 West 11th Street  
Austin, Texas 78701-2099  
(w/documents submitted by Mr. Johnson)